IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.405 OF 2007
WITH
CRIMINAL APPLICATION NO.1889 OF 2006
AND
CRIMINAL APPEAL NO.406 OF 2007
WITH
CRIMINAL APPLICATION NO.1890 OF 2006
AND
CRIMINAL APPEAL NO.407 OF 2007
WITH
CRIMINAL APPLICATION NO.1891 OF 2006

M/s. Fortress Financial Services Ltd. ...Appellant.
V/s.
1.M/s.S. & S. Industries & Enterprises
& Ors ...Respondents.

Kafil Khan & Mundra, advs. for the Appellant.
Mr.Arun H. Palekar i/b M/s Ashwini Kumar & Co. for the for the Respondent Nos.1 to 6.
Mr.Y.S.Shinde, APP for the State.

CORAM: J.H.BHATIA, J.
DATE : 21st April, 2007.
P.C.:

1. Leave to prefer appeals against the acquittal is granted.

2. Admit.

3. With consent of the learned counsel for both the parties, these appeals are taken up for final hearing and disposal immediately.

4. The appellant had filed 3 complaints under Section 138 of the Negotiable Instruments Act against 7 accused persons. Accused no.1 is the company and the

accused no.2 to 6 were directors, while the accused no.7 was the Deputy Manager Accounts. All these three complaints were filed in September, 1998 and they were initially registered as Complaints Numbers 2069/M/98, 2070/M/98 and 2071/M/98 . It appears that these matters were renumbered as criminal case nos. 1173/S/2001, 1174/S/2001 and 1175/S/2001. Verification statements were recorded on 12-10-2001 and the process was issued against the accused persons on 8-11-2001. It appears that after issuance of process, matter was adjourned on 6 occasions during the period of about 3 years. As the complainant is also the company, exemption was granted from appearance on 19-4-2002. On the next date i.e., on 9-8-2002 the complainant company was represented by some officer with advocate. On 24-4-2003 the complainant was absent but exemption was granted and Advocate for the complainant was present. It appears that summons issued to the accused were not returned after service till that time. Awaiting report, matter was adjourned on 29-8-2003. However, on that date, board was discharged. It appears that nothing was done on that day. Matter was adjourned to 8-1-2004. On that day both the parties were absent and the matter was adjourned to 13-4-2004. On 13-4-2004 none was present for the complainant and the case came to be dismissed in default under Section 256 of the Cr.P.C. The learned Magistrate passed the

following order:

> "This is a case of 2001. Complainant is not willing and taking steps. Complaint is dismissed as per Section 256 of the Cr.P.C. Accused are acquitted. His/Their bail bond stands cancelled."

It appears that the learned Magistrate passed the order mechanically without application of mind to the facts of the case. The learned Magistrate failed to note that summons, which were issued and sent to Chennai for service were not yet returned either served or unserved. It appears that even though the complaints were filed in the year 1998, for about 3 years, case was not even taken up for recording verification statement because the Court was vacant. It took more than 3 years to record the verification statements and thereafter, also matter was adjourned from time to time giving dates of about 3-4 months each time. The Court had never directed the complainant to take steps to issue fresh summons to the accused persons. Matter was only adjourned awaiting report about service of summons. From this it is clear that on 13-4-2004 when the complaints were dismissed, presence of the complainant was not absolutely necessary for further proceeding. It could not be stated that the matter could not proceed because of the absence of the complainant on that day. In fact, the learned Magistrate could have directed that

because the reports about service of the summonses were not received for long time, the complainant should take steps for issuance of process afresh. But no such order was passed. Surprisingly the learned Magistrate also did not note that the accused were not served and had not appeared before the Court on any date and in the final order, the learned Magistrate directed that the bail bonds of the accused shall stand cancelled. Infact, the bail bonds were never executed or furnished because the accused persons had never appeared. This indicates that the impugned order was passed mechanically without looking to the facts in detail and without application of mind.

5. Taking into consideration these circumstances, I find that the impugned order is liable to be set aside.

6. It may be noted here that even though in the complaint before the trial Court, the case was against 7 accused persons, appeals before this Court are restricted only to accused nos.1 to 5. Accused no. 6 was not made party to the appeal and accused no.7, who was shown as the respondent no.6, was deleted. Therefore, appeals can be allowed and the complaints may be restored to the file of the learned Magistrate only

to the extent of accused nos.1 to 5.

7. For the aforesaid reasons, all the appeals are hereby allowed to the extent of the accused nos.1 to 5 and the Criminal Cases Nos.1173/S/2001, 1174/S/2001 and 1175/S/2001 are restored to the file of the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai.

8. As these criminal cases are 9 years old and long time was taken for service of summons to the respondents/accused and as now in these appeals, respondents are represented by Mr.Arun Palekar instructed by M/s.Ashwini Kumar and Company, I hereby direct the respondent nos.1 to 5 to remain present before the learned Metropolitan Magistrate on 6th June, 2007 without fail. Mr.Arun Palekar shall communicate this order to M/s. Ashwini Kumar & Co. and the said M/s. Ashwini Kumar & Co. shall communicate this order to the respondent no.1 to 5. If the respondent nos.1 to 5 fail to make appearances before the learned Magistrate on the next date, the learned Metropolitan Magistrate may take such steps as may be found necessary, presuming that in spite of service, they are absent.

(J.H.Bhatia,J.)